Supreme Court, U.S.
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No. 86-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

BRIEF IN SUPPORT OF APPELLANT HARSH INVESTMENT CORP.

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QUESTIONS PRESENTED

Appellees Landmark Land Company, Inc.* and South-

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*The following are subsidiaries of Landmark Land Company, Inc.:

Dixie Savings & Loan Association; Unique Golf Concept, Inc.; Dixiensurance Agency, Inc.; Landmark Title Agency, Inc.; Landmark Financial Services, Inc.; United Bankers Mortgage Corporation; Kansas Bankers Mortgage Corporation; Dixie Finance Company; Dixie Management Corporation, Inc.; St. Bernard Savings & Loan Association; Landmark Life Insurance Company; Clock Tower Place Investments, Ltd.; Snyder Capital Partners; Palm Beach Realty Associates; Landmark Land Company of Florida, AG; Investors Financial Services; 1615 Development Corp.; Investors Insurance Agency, Inc.; Oak Tree Golf Club, Inc.; Waterford Landmark, Inc.; Landmark Real Estate; Landmark Title Insurance Company, Inc.; La Quinta Air Services; Landmark Land Construction Company; Landmark Land Mission Hills Corp.; Mission Hills Real Estate Company; Carmel Valley Ranch—dba's: Carmel Valley Ranch Golf Club, Carmel Valley Ranch Lodge, Carmel Valley Ranch Properties, Carmel Valley Ranch Realty, Carmel Valley Ranch Resort, Carmel Valley Ranch Sewage Treatment Plant, Carmel Valley Ranch Tennis Club; Dixie Escrow Company, Inc.—dba's: Dixie Escrow Services, LANDMARK Escrow Company, Oak Tree Escrow Company; Hotel Resort Management Ltd.—dba's: La Quinta Hotel; Landmark Land Company of California, Inc.—dba's: Design Centers, Dixie Mortgage Company, Foster Turf Products, FTP Wholesale Growers, La Quinta Hotel Golf and Tennis Resort, La Quinta Hotel Golf Club, La Quinta Hotel Golf and Tennis Resort, Hotel Tennis Club, La Quinta National Golf Club, Landmark Communications, Landmark Mortgage Company, National Car Rental Agency, PGA West, Thermal Nursery; Landmark Land Company of Florida, Inc.—dba's: Palm Beach Polo & Country Club; Landmark Land Company of Louisiana, Inc.—dba's: Belle Terre Golf and Country Club, Landmark Homes, Shelter Industries Company; Landmark Land Company of Oklahoma, Inc.—dba's: Caston Lumber Company, Home Improvement Co., Oak Tree Estates, Oakridge Manor, Oklahoma Business Investments, Inc., Redlands, The Waterford Hotel; Landmark Land Development Corp.—dba's: Clarkdale Realty, Inc. (in Arizona), LML Development Corp. (in California), LML Development Corp. (in Oklahoma); Mission Hills Company—dba's: Mission Hills Country Club, Mission Hills Golf Club, Mission Hills Tennis Club, Mission Hills Real Estate, Mission Hills General and

moor Park Shopping, Inc.** concur in and adopt the statement of Questions Presented by Appellant Harsh Investment Corp. at page (i) of its Jurisdictional Statement.

Administrative Committee; Oak Tree Club, Inc.—dba's: Oak Tree Country Club, Oak Tree Golf Club, Oak Tree Properties.

Olympia & York Realty Corp. is an affiliate of Landmark Land Company, Inc.

** Southmoor Park Shopping, Inc. has no parent companies, subsidiaries, or affiliates.

TABLE OF APPENDICES

Appellees Landmark Land Company, Inc. and Southmoor Park Shopping, Inc. adopt the Appendix to the Jurisdictional Statement presented by Appellant Harsh Investment Corp. All references will be to that Appendix.

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On Appeal from the Supreme Court, State of Colorado

BRIEF IN SUPPORT OF APPELLANT HARSH INVESTMENT CORP.[1]

OPINIONS BELOW

The decision of the Colorado Supreme Court (App. A at 1a-14a), dated December 2, 1986, is reported at 728 P.2d 1281. A transcript of the state district court's decision rendered August 15, 1984, is reproduced in App. B (at 15a-25a). The district court's order dismissing appellee Landmark Land Company Inc., complaint (App. C at 26a) was entered August 28, 1984.

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[1] Appellees Landmark Land Company, Inc. and Southmoor Park Shopping, Inc. respectfully request leave to file this brief despite the expiration of the twenty-day limit for filing such responses provided in Rule 10.4 of the Rules of the Supreme Court of the United States. Appellees received a request from Appellant Harsh Investment Corp. to file a response in support of the Jurisdictional Statement but were unable to complete preparation of such a response in the eight days between the receipt of such request and the expiration of the twenty-day deadline.

JURISDICTION

The decision of the Colorado Supreme Court was rendered December 2, 1986. Appellee Landmark Land Company Inc.'s motion for rehearing was denied by an order of the Colorado Supreme Court entered September 22, 1966 (App. D at 27a-29a). Harsh Investment Corp. filed a notice of appeal (App. E at 30a-33a) with the clerk of the Colorado Supreme Court on March 2, 1987. The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> "[N]or shall private party be taken for public use, without just compensation."

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> "No state shall * * * deprive any person of life, liberty or property, without due process of law * * *."

Section 10.62.5 of the Revised Municipal Code of the City and County of Denver (hereinafter cited as "Code") is reproduced in Harsh Investment Corp.'s Appendix F at 42a-44a.

STATEMENT OF THE CASE

Appellees Landmark Land Company, Inc. (hereinafter "Landmark") and Southmoor Park Shopping, Inc. (hereinafter "Shopping") adopt the Statement of the Case propounded by Harsh Investment Corp. in its Jurisdictional Statement (pp. 2-10) with the following additions:

The Colorado trial and appellate courts' rejection of a public purpose regulatory taking absent a total deprivation of use and value of private property disregards not only the case-by-case consideration of factual circum-

stances required by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), but also the distinction between this case, which concerns elimination of a finally established land use by virtue of a "pure" police power action and those cases involving denial of rezoning to a higher or more intensive use or modification of existing zoning by following zoning processes and procedures. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 87 L.Ed.2d 126, 139 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986).

Landmark is the owner of slightly more than thirteen acres of land, one-half of which is totally undeveloped and the other half of which contains a movie theater and ice rink. Tr. 33.[2] In 1965, Landmark entered into a ninety-nine year development lease for the property, but subsequently purchased it in 1981 and planned an office building, parking structure, and relocation of the movie theatre. Tr. 33, 66. Neighborhood opposition to the development plan generated numerous meetings between Landmark and the neighborhood homeowners' association, which resulted in concessions by Landmark, including elimination of the theatre and a reduction in density. Tr. 33-44. The negotiations ended when the association requested that Landmark reduce the office density by nearly two hundred twenty-five thousand square feet. Tr. 45.

Two rezoning attempts filed by the homeowners' association followed, both of which attempted to reduce the potential build-out by forty percent. Tr. 50. Following this, the challenged mountain view ordinance, § 10-62-5 of the Code, was enacted which eliminated Landmark's ability to build a valuable twenty-one story office building, limiting any structure on the land to forty-two feet, or approximately

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[2] "Tr." references the transcript of proceedings before the Denver District Court.

three stories. App. F; Tr. 50, 57. The trial court noted that undisputed testimony substantiated Landmark's claim of devaluation of its property and found that the diminution was "substantial" (App. B, p. 19a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In contrast with other cases which raise a taking claim, this case presents a true taking away of existing, authorized uses of land not by changing the legally established use through a change of zoning classification but rather by superimposition of police power legislation which purports to protect a scenic mountain view. Unlike the quasi-judicial process of zoning or rezoning, which requires a modicum of due process through notice, public hearing, and factual determinations (App. A, p. 8a), there is no requirement for such due process in the enactment of legislation.

At the very least, this use of the police power should be supported by a more concrete definition of the substantial public purpose of a regulation which interferes with legitimate land use than mere allusion to the general welfare, *Nectow v. City of Cambridge*, 277 U.S. 183, 187-188 (1928). While the absolute protection of private property provided by the Fifth and Fourteenth Amendments may be qualified by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co.*, 260 U.S. at 415.

Nonetheless, the Colorado Supreme Court foreclosed any examination of the ordinance's public purpose, which obviated any need for consideration of whether "the interests of the public * * * require such interference", *Lawton v. Steele*, 152 U.S. 133, 137 (1894), effectively equating enactment of legislation with public necessity. Further the Colorado court repudiated any weighing of the public

benefit provided against the private burden imposed, barring any deliberation of whether "the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals". *Id.*

This approach contravenes the balancing principles of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978) and *Kaiser Aetna*, 444 U.S. at 175 which impart the constitutional protections while "giving due weight to the new conditions". *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). A review of the lower court's decision is therefore warranted lest the vicissitudes of political judgments and the power of majorities and officials override the very purpose of the Fifth Amendment and eliminate private property. "One's right to life, liberty and property . . . may not be submitted to vote." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Accepting, *arguendo*, that the challenged ordinance bears a substantial relation to the general public health, safety, or welfare, *Nectow* 277 U.S. at 188, inquiry still must be made of its impact on the three commercial properties, *Penn Central*, 438 U.S. at 136. In Landmark's case, as with Harsh and Southmoor, the ordinance effectively occupied the total air space above the forty-two foot level for the politically acceptable purpose of temporarily preserving a fragmentary mountain view in response to submission of a development plan meeting all existing zoning requirements. The Landmark property derived no benefit from the ordinance, only burden.

That this abrogated the reasonable investment-backed expectations Landmark had for its property is not disputed. Under the single issue test, enunciated by the Colorado Supreme Court, since there was some remaining value and use for this property, the fact that legitimate and reasonable uses permitted by zoning were eliminated without a zoning change is inconsequential, notwithstand-

ing other similarly situated commercial property owners were not so affected merely because their structures had already been constructed.

The preexisting air rights of Landmark, like those of Appellant Harsh and of Shopping have been taken away, as has the right to build a single, high-rise office under the existing zone category merely because the property lies between a small neighborhood park and the mountains and neighborhood opposition, having failed to change the permitted zoning use, determined to preserve an admittedly temporary mountain view. The narrow and inflexible determination of a regulatory taking established by the Colorado courts fails to accord Landmark, Shopping, or Appellant Harsh any measure of the protection established in the Fifth and Fourteenth Amendments.

Unlike the urban renewal project challenged in *Berman v. Parker*, 348 U.S. 26 (1954), and the landmark preservation scheme found in *Penn Central*, 438 U.S. at 132, both of which comprised part of a comprehensive plan, the challenged ordinance is subject to no comprehensive plan and, in fact, contravened the mountain view protection principles established by the Denver planning office. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.*, 260 U.S. at 416. This case presents an opportunity to clarify the myriad of issues repeatedly raised when private property is regulated by the police power and to provide some definition of when "regulation goes too far". *Pennsylvania Coal Co.*, 260 U.S. at 415.

In all other respects, Landmark and Shopping adopt the arguments set forth in Appellant Harsh Investment Corp.'s Jurisdictional Statement.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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May 26, 1987